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December 21, 2011

FILED/ACCEPTED

DEC 21 2011

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: NextG Networks of California, Inc. Petition For Declaratory Ruling That Its
Service Is Not Commercial Mobile Radio Service**

Dear Ms. Dortch:

Attached is the Petition for Declaratory Ruling filed by NextG Networks of California, Inc. ("NextG") pursuant to Rule 1.2 of the Commission's Rules.

In the Petition, NextG asks for a ruling that the services it offers and provides is not a Commercial Mobile Radio Service, as defined by the federal Communications Act and the Commission's Rules. As such, although NextG is not a CMRS provider, the Petition raises issues most likely appropriate for assignment to the Wireless Telecommunications Bureau.

Please contact the undersigned counsel for NextG if there are any issues with the filing of this Petition.

Respectfully submitted,

/s/ T. Scott Thompson

T. Scott Thompson
Counsel for NextG Networks of California, Inc.

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Pursuant to Rule 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, NextG Networks of California, Inc. ("NextG") respectfully petitions the Commission for a declaratory ruling that the telecommunications service it provides via distributed antenna systems ("DAS") and other "Small-cell Solutions" is not Commercial Mobile Radio Service ("CMRS") and NextG does not provide CMRS, as defined by the Communications Act and the Commission's rules.

I. INTRODUCTION AND SUMMARY

NextG submits this Petition for Declaratory Ruling pursuant to an order by the Superior Court of Arizona, County of Maricopa, which stayed pursuant to the primary jurisdiction doctrine an action pending before that Court between NextG and the City of Scottsdale ("City") so that this Commission could resolve a key question in that action – whether the telecommunications service that NextG offers and provides via DAS networks and other "Small-cell Solutions" ("NextG's Service") is CMRS. The City has argued that NextG's Service is a "mobile service" and therefore not protected by Arizona Statute from certain fees sought to be imposed by the City. As demonstrated below, the City's argument ignores the fact that NextG does not provide any radio communication service and that NextG's Service is provided entirely over fiber optic facilities between fixed points, not mobile stations, and thus its service is not a mobile service.

Ultimately, NextG's Service is fundamentally similar to the many forms of backhaul that support the wireless industry. Indeed, the City's argument ignores the fact that almost all CMRS communications must be transported at some point in the chain of communication across wired networks, and thus, the City's position would convert all those wired networks into CMRS by association. The Communications Act clearly differentiates between "wired communications" and "radio communications" and the City's position would impermissibly eviscerate that distinction.

Accordingly, because NextG's Service does not meet the most basic requirements for classification as a "mobile service," the Commission should issue a Declaratory Ruling that it is not CMRS under the Communications Act and the Commission's Rules.

II. BACKGROUND

A. Description of NextG's Facilities And Service

NextG provides telecommunications service over various fiber optic based networks. Most commonly, NextG has provided its telecommunications services via "Distributed Antenna Systems." Declaration of David Cutrer dated December 21, 2011 ("Cutrer Decl.") ¶ 5. NextG's primary customers are commercial mobile radio service providers, such as AT&T Wireless, Verizon Wireless, T-Mobile, Sprint, MetroPCS, and Cricket. *Id.* at ¶ 6. As such, NextG is a "carrier's carrier." *Id.* NextG does not have any relationship with or provide any service to retail end users of wireless or wireline telecommunications services. *Id.* at ¶ 9.

NextG provides its telecommunications service by receiving communications signals that its carrier customers hand off to NextG at fixed points and then transporting those signals over NextG's fiber optic facilities. Cutrer Decl. ¶ 7. In the case of a DAS configuration, NextG's customers may give NextG signals to carry in two directions. *Id.* In the case of a signal that originates with a retail end user's mobile device, this handoff from NextG's customer to NextG takes place at and through equipment configurations called "Nodes" that are located on utility or streetlight poles located in the public rights-of-way or in private utility easements. *Id.* The equipment comprising a typical "Node" includes a small, low-power antenna, laser, and amplifier equipment for the conversion of radio frequency signals ("RF") to optical signals (or from optical to RF), fiber optic lines, and associated equipment such as power supplies. *Id.*

Once a carrier's radio signal traveling over the air from a mobile device reaches a "Node," the signal is handed over to NextG from its carrier customer at the antenna, where the

signal is first converted to electric signals to be transported a few feet from the antenna to the equipment on the same pole that converts the signal to light waves, and NextG's service then transports the communications through its fiber optic network to a distant point that is typically, but not always, an aggregation point typically called a "Hub." Cutrer Decl. ¶ 8. The Hub is located at a central location, typically its customer's Base Station, that contains equipment such as routers, switches, and signal conversion equipment. *Id.* At the Hub, communications being carried on light waves are converted back to an electric RF signal and handed back to NextG's carrier customer, where the communications signals are received by the customer's network at the carrier customer's Base Station. *Id.* The carrier customer's Base Station equipment includes radio equipment that ultimately controls the radio frequency transmissions. *Id.* Thus, all RF transmissions and wireless services are controlled and provided by NextG's wireless carrier customers – not NextG – through the carrier customer's equipment located at the Base Station. *Id.*

For a communication travelling in the opposite direction, the sequence and NextG's service works in reverse. Cutrer Decl. ¶ 9. The equipment in NextG's carrier customer's Base Station originates signals that are handed off to NextG at the Hub. *Id.* From the Hub, NextG transports the carrier customer's signals across NextG's fiber optic lines to the appropriate Node, which is at a location dictated by NextG's carrier customer. *Id.* At the Node, the communication that has traveled along NextG's fiber optic lines is placed into an electrical format for transport the few feet up coaxial cable on the pole to reach the antenna, and at the antenna the signal is converted into free-space radio waves that are handed off to the wireless carrier customer, which in turn transmits the radio signals to its retail end users' mobile devices. *Id.* The emission of the RF signals is controlled by NextG's carrier customer through the radio equipment located at the

carrier customer's Base Station. *Id.* NextG does not provide or control radio transmissions between the Node and a carrier customer's subscriber's mobile device. *Id.*

The Node equipment, including the antenna at the Node, is integral to NextG's Service and network. Cutrer Decl. ¶ 11. NextG can and does provide the same service to multiple wireless carriers using the same antenna(s) on a single DAS network. *Id.* at ¶ 12.

B. NextG's Pending Lawsuit In Arizona Depends On The Commission's Classification Of NextG's Service

NextG has been seeking to install its DAS facilities in the City since March 2009. In response to NextG's requests to install its DAS facilities in the City, the City informed NextG that, among other requirements, NextG would be required to pay the City an annual amount ("Encroachment Permit Fee") for each of the Nodes located in the public rights of way. Declaration of Robert L. Delsman dated December 21, 2011 ("Delsman Decl.") ¶ 3.

NextG commenced an action against the City in the Superior Court of Arizona, alleging that the City, through its Resolution No. 7983 imposing an annual Encroachment Permit Fee, has exceeded the lawful fees or taxes the City is authorized to impose on telecommunications corporations in relation to the occupation of the public rights of way under Arizona Revised Statutes § 9-582 (the "Arizona Action"). Specifically, NextG alleges that A.R.S. § 9-582(A) provides that the City cannot levy a "tax, rent, fee or charge" on a "telecommunications corporation" providing "telecommunications services" other than four specific impositions not at issue here.¹

The City's primary, if not only, defense in the Arizona Action is its assertion that NextG is not a "telecommunications corporation" providing "telecommunications services" and thus A.R.S. § 9-582 does not apply. Specifically, the City argues that NextG falls outside the

¹ A.R.S. § 9-582(A).

definition of “telecommunications corporation” under A.R.S. § 9-581 because, the City asserts, NextG provides wireless services, in particular “commercial mobile radio service,” which is excluded from the definition of “telecommunications” under A.R.S. § 9-581.

A.R.S. § 9-581 defines “Telecommunications services” as “the offering of *telecommunications* for a fee directly to the public, or to such users as to be effectively available directly to the public, regardless of the facilities used.”² The term “telecommunications” in turn is defined as excluding “commercial mobile radio services:”

the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. ***The term does not include commercial mobile radio services***, pay phone services, interstate services or cable services.³

The Arizona statute then defines “commercial mobile radio service” by reference to the federal Communications Act and the Commission’s rules. A.R.S. § 9-581(1).

The City contends that NextG provides commercial mobile radio services, which is excluded from the definition of telecommunications, and thus is not a telecommunications corporation providing telecommunications services that is protected from A.R.S. § 9-582. NextG believes that the facts clearly demonstrate that it does not provide commercial mobile radio services. Therefore, whether or not NextG is a “telecommunications corporation” providing “telecommunications services” and protected by A.R.S. § 9-582 depends, at least for purposes of the City’s argument in the Arizona Action, on whether NextG provides “commercial mobile radio service” as defined by the Commission and the federal Communications Act.

Because the issue of whether NextG provides commercial mobile radio service involves technical facts regarding NextG’s technology, services, and the networks and equipment used to

² A.R.S. § 9-581(6) (emphasis added).

³ A.R.S. § 9-581(4) (emphasis added).

provide NextG's services, and because the relevant Arizona statute explicitly incorporates the definition of commercial mobile radio service "as defined by the federal communications commission,"⁴ NextG made an unopposed motion to stay the Arizona action pursuant to the doctrine of primary jurisdiction so that the issue of whether NextG provides commercial mobile radio service could be resolved by the Commission. On November 18, 2011, the Superior Court entered an order staying the Arizona Action and referring the "single, specific question of whether NextG provides commercial mobile radio service" and requesting that "the FCC act in an expedited manner on the petition for declaratory ruling that NextG will file with the FCC raising that issue." Attached hereto as Exhibit 1 is a true and correct copy of the November 18, 2011 Order.

Through this Petition for Declaratory Ruling, NextG seeks a ruling by the Commission that NextG's Service is not CMRS. Such a ruling is necessary in order to terminate a controversy in the Arizona Action, which will allow the Court in that action to move forward to render a decision in that action. Further, the Commission's resolution of this issue will remove any uncertainty regarding the same issue that may arise in any other jurisdiction in future matters.

III. THE FCC SHOULD DECLARE THAT NEXTG'S SERVICE IS NOT CMRS

The analysis of whether NextG's Service is CMRS begins with the statutory definition of "commercial mobile service." In Section 332 of the Communications Act, "commercial mobile service" is defined as

any *mobile service* (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be

⁴ A.R.S. § 9-581(1).

effectively available to a substantial portion of the public, as specified by regulation by the commission.⁵

The commercial mobile service provisions of the Act are implemented under section 20.3 of the Commission's rules, which employs the term "commercial mobile radio service." 47 C.F.R. § 20.3. Section 20.3 of the Commission's Rules defines "Commercial Mobile Radio Service" as "*a mobile service* that is: (a)(1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section." 47 C.F.R. § 20.3 (Emphasis added).

Thus, under both the Act and the Commission's rules, the threshold and key element is whether the service is a "mobile service." Because NextG's service is not a "mobile service" it is not within the definitions of CMRS.

Section 3(27) of the Act and Section 20.3 of the Commission's Rules, in turn, define the term "mobile service," in pertinent part, as:

a radio communication service carried on between *mobile stations* or receivers and land stations, and by mobile stations communicating among themselves.⁶

Applying this definition of "mobile service" to NextG's Service, the Commission should conclude that NextG's Service does not meet either part of the definition of "mobile service" because (1) NextG does not provide "radio communication" and (2) it does not provide service via facilities that are "mobile stations," and thus, NextG's Service is not CMRS.

⁵ 47 U.S.C. § 332(d)(1) (emphasis added).

⁶ 47 U.S.C. § 153(27); 47 C.F.R. § 20.3 (emphasis added).

A. NextG Does Not Provide “Radio Communication Service”

The Act defines “radio communication” as “the *transmission by radio* of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission.”⁷ NextG’s Service very clearly does not meet this definition because it does not transmit signs, signals, pictures or sounds by radio. As described above, NextG transports its carrier-customers’ signals via fiber optic line and in a *de minimis* part by coaxial cable. Cutrer Decl. ¶¶ 8, 9. Once NextG has transported a communication over its fiber optic facilities to the antenna at the Node, or to the Hub in the other direction, the communication is then handed off to NextG’s carrier customer, where the communication is converted back to an RF signal and NextG’s customer controls and provides the transmission by radio to the end consumer’s mobile device. *Id.* All RF transmissions and wireless services provided after the handoff from NextG’s hard wired facilities are controlled and provided by NextG’s wireless carrier customers – not NextG. *Id.* NextG does not have any radios in its service or facilities. *Id.* at ¶ 8.

NextG’s Service is no different from, and indeed competes directly with, the fiber-based backhaul/private line service provided by Incumbent Local Exchange Carriers (“ILECs”) and other competitive fiber companies. Cutrer Decl. ¶ 8. Fundamentally, all wireless networks are supported or served by various wireline transport services (e.g., “backhaul”).⁸ If merely

⁷ 47 U.S.C. § 153(33) (emphasis added).

⁸ See, e.g., *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, WT Docket No. 10-133 at ¶¶ 319-320 (Rel. June 27, 2011) (recognizing the role of backhaul connections).

connecting with or providing service to a wireless equipment location converted that wired provider into a wireless provider, nearly the entire telecommunications industry could be considered “wireless.” Not every component part of the system that is ultimately used by CMRS providers inherently becomes “mobile” or “wireless” as a result.

It is also clear that NextG’s service is not “incidental to” the transmission of radio communications by NextG’s carrier-customers. The Communications Act explicitly differentiates between “wire communication” and “radio communication.” 47 U.S.C. § 153(33) & (52). In *U.S. v. Norris*, 88 F.3d 462 (7th Cir. 1996), the Seventh Circuit Court of Appeals addressed a similar situation and held that the wireline service does not become “incidental to” the wireless service. In *Norris*, the court was required to address whether cable television service was a “wire communication” or a “radio communication.” The government argued first that “because wire transmissions are technically radio waves (electrical energy with a wavelength in the ‘radio wave’ band of the electromagnetic spectrum) delivered through the conduit of a conducting cable, all wire communications (except, perhaps, fiber optic transmissions) are included within the definition of communication by radio.” *Id.* at 467.⁹ The court rejected that argument, holding that it “impermissibly conflates the definitions of wire and radio communications under Title 47--definitions which for over eighty years Congress has treated as distinct and mutually exclusive.” *Id.*

The government in *Norris* also argued that cable television services were “radio communication” because cable operators receive over-the-air “radio” broadcasts and then transport them across the cable system to subscribers on the other end of the line. The government argued that the cable system was therefore “incidental to” the original television

⁹ Of course in this case NextG’s transmissions are almost exclusively over fiber optic lines, with only small pieces of coaxial cable on the pole.

broadcasters' radio service. *Id.* The court also rejected this argument by the government, holding that it "unacceptably blurs the line between radio and wire communications." *Id.*

In *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 201-02 (3d Cir. 2001), the Third Circuit followed the *Norris* decision in rejecting the argument that merely because cable operators retransmit across wires what were originally radio transmissions they are "incidental to" the radio communications. Looking to the definitions of "wire" and "radio" communications, the *TKR Cable* court first opined that "Congress clearly defined wire and radio communications as concepts involving distinct types of transmissions." *Id.* at 201 (citing 47 U.S.C. § 153(33) & (52)). The court then expanded on the *Norris* decision, explaining that "[t]he wires that connect a home satellite dish to the living room television arguably constitute facilities incidental to the transmission." *Id.* at 202. However, the court concluded that "the entire cable transmission infrastructure of a city or suburban area, a structure that provides a foundation for a significant business, such as that of TKR, or any other major cable service provider, cannot be considered a mere instrumentality to transmission." *Id.*

NextG's service and facilities fall squarely within the analysis in *TKR Cable* and *Norris*. Congress explicitly differentiated between "wire" and "radio" communications. NextG's service at no time is transmitted across the open airwaves. It is all within a closed wired network and constitutes a "wired service" under the Act.¹⁰ NextG's thousands of miles of fiber optic lines create a network that NextG uses to transport the signals of multiple wireless carrier customers.

¹⁰ 47 U.S.C. § 153(52) ("The term 'wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.")

Delsman Decl. ¶ 2. NextG's fiber optic lines are not the equivalent of a few feet of wires bringing a satellite signal off a resident's roof to the television inside the house.

The fact is that in order to complete most "wireless" calls the vast majority of the signals are transported on wireline networks, perhaps by multiple different companies. All of those wired services are not converted to "radio communication" simply because they carry traffic for wireless service providers.

Accordingly, the fact that NextG provides a telecommunications service to wireless providers and therefore incorporates or serves some wireless equipment does not mean that NextG itself is providing mobile service.

B. NextG's Service Is Not Carried On Between Mobile Stations And Land Stations Or Between Mobile Stations Communicating Among Themselves

In addition to the fact that NextG does not provide radio communication service, its service is not carried on between mobile stations. Under the Act and the Commission's rules, even if NextG's service were a "radio communication service," to qualify as a "mobile service" the service must be "carried on between *mobile stations* or receivers and land stations, and by mobile stations communicating among themselves."¹¹ While NextG provides service that may terminate at facilities that may be "land stations" (i.e. the Node), it does not provide service between those land stations and mobile stations or receivers or between mobile stations communicating among themselves.

A "mobile station" is defined by the Communications Act as "a radio-communication station capable of being moved and which ordinarily does move."¹² The statutory definition of "mobile station" thus has two prongs (1) it is capable of being moved; and (2) it ordinarily does

¹¹ 47 U.S.C. § 153(27); 47 C.F.R. § 20.3.

¹² 47 U.S.C. § 153(28).

move.¹³ NextG does not provide service to or via “mobile stations.” As explained above, NextG provides transport service over fiber optic lines between *stationary* Hubs and *stationary* antenna locations called Nodes.

NextG’s typical service has two end points: one at the Node and one at the Hub. NextG does not provide a service between the Node and any consumer’s mobile device. Moreover, none of the equipment involved in NextG’s Service is capable of being moved or ordinarily does move. Unlike the wireless access unit described in the Commission’s *BUS Order*, neither NextG’s Node nor the “Hub” can be “picked up, placed in a car, rolled down the road and taken to the barn.”¹⁴ Instead, each Node and Hub is limited to a specific location and can only operate at that location. Cutrer Decl. ¶¶ 7, 8. Under the Commission’s rules and precedent, to qualify as mobile stations, the station must operate while moving or from unspecified locations.¹⁵ Thus, even if NextG were providing radio communications (which it does not, as explained above), NextG’s Service would be more like the Basic Exchange Telephone Radio Systems (BETRS) described in the *BUS Order*, where the radio equipment used to provide that service was limited to a specific location and can only operate at that location.¹⁶ For that reason, NextG’s Service would not be classified as incorporating mobile stations. Thus, the equipment used to facilitate NextG’s Service does not satisfy the definition of mobile station.¹⁷

¹³ See *In re Petition of State Independent Alliance and Independent Telecommunications Group*, 17 FCC Rcd. 14802 (Rel. Aug. 2, 2002) (“*BUS Order*”).

¹⁴ *Id.* at 14802 at ¶ 17.

¹⁵ *BUS Order* at ¶ 21.

¹⁶ *Id.* at ¶ 17.

¹⁷ The City has asserted that NextG has admitted to providing mobile service because NextG has asserted rights under 47 U.S.C. § 332(c)(7). The City confuses the fact that NextG’s network provides service to and incorporates wireless equipment at the Node with NextG itself providing mobile service. Section 332(c)(7)(B) limits the authority of local governments over the regulation or placement of “personal wireless service *facilities*.” 47 U.S.C. § 332(c)(7)(B)(i)

Accordingly, because NextG's DAS service does not meet the most basic requirements for classification as a "mobile service," the Commission should issue a Declaratory Ruling that it is not CMRS.

C. Multiple State Commissions Have Exercised Jurisdiction Over NextG's Market Entry, And Have In Several Cases Explicitly Rejected Municipal Arguments That NextG Provides Wireless Service

Under Section 332(c)(3) of the Communications Act, state regulatory commissions are preempted from regulating entry by CMRS providers. 47 U.S.C. § 332(c)(3). Thus, the Arizona Corporation Commission and other state commissions cannot require a certificate of public convenience and necessity (a "certificate of convenience and necessity" in Arizona) nor grant such a certificate to NextG as a condition of entry if NextG's Service is CMRS.

NextG has applied for and received certificates of public convenience and necessity (or the equivalent thereof) in 35 states, including Arizona, the District of Columbia, and Puerto Rico. Delsman Decl. ¶ 4. As an inherent part of granting NextG entry certificates, those state commissions had to determine, implicitly if not explicitly, that NextG was within their jurisdiction and thus *not* providing CMRS.

In California, the California Public Utility Commission has twice rejected assertions by cities that NextG provides wireless service and should not have been granted a certificate.¹⁸ In

(emphasis added). As a result, a company need not provide wireless services itself in order for the deployment of wireless "facilities" to be protected by Section 332(c)(7). Indeed, tower companies that provide no telecommunication service at all have brought actions under Section 332(c)(7). *See, e.g., National Tower, LLC v. Plainville Zoning Bd. Of Apps.*, 297 F.3d 14, 17 (1st Cir. 2002) ("The federal courts now routinely hear cases brought under the Telecommunications Act of 1996 by those who wish to construct cellular antenna towers and have been denied permission to do so by local town officials").

¹⁸ California Public Utilities Commission Decision 10-10-007 in *Application of NextG Networks of Calif., Inc.*, Case 08-04-037 (Oct. 18, 2010) ("Huntington Beach reasons that NextG primarily provides radiofrequency transport services for NextG's wireless carrier customers, therefore NextG itself is a wireless carrier. The reasoning is faulty."); *see also* California Public Utilities

its October 2010 Order rejecting claims by the City of Huntington Beach that NextG is a wireless company, the California PUC first held that “Under federal law effective from 1994, a state may not regulate market entry of a wireless carrier. Consequently, the Commission’s grant of CPCNs to NextG in 2003 and 2007 necessarily determined that NextG is not a wireless carrier.”¹⁹ The California PUC then held that “NextG’s provision of radiofrequency transport services to wireless carriers does not constitute NextG itself a wireless carrier.”²⁰

The Arizona Corporation Commission has likewise rejected claims that DAS companies provide wireless service and are not entitled to a certificate from the Arizona Commission. In April 2009, the City moved to intervene before the Arizona Commission in the application docket of one of NextG’s competitors, a company called NewPath Networks.²¹ In that proceeding, the City advanced the argument that Distributed Antenna Systems provide mobile service and the Arizona Commission lacks jurisdiction to grant such providers a certificate of convenience and necessity (or “CCN”).

Even though the City withdrew its status as intervenor in the NewPath certificate proceeding after NewPath agreed to pay the City’s fees (a telling sign that the City was not truly concerned about the regulatory status but was instead only engaged in the proceeding to pressure NewPath to pay the fees that NextG now challenges), the City’s Hearing Memorandum was adopted by the Towns of Paradise Valley and Carefree and considered fully by the Arizona

Commission Decision 06-01-006 in *City and County of San Francisco v. NextG Networks of California, Inc.*, Case 05-03-010 (Jan. 12, 2006) (rejecting assertion by City of San Francisco that NextG is a wireless provider).

¹⁹ *Application of NextG Networks of Calif., Inc.*, Decision 10-10-007 at 31.

²⁰ *Id.*

²¹ See *In re: Application of NewPath Networks, LLC, for Approval of a Certificate of Convenience and Necessity to Provide Transport and Backhaul Services*, Docket No. T-20567A-07-0662, City of Scottsdale Application to Intervene, at 2-3 (Apr. 10, 2009). A copy of the City’s Application to Intervene, without exhibits, is attached hereto as Exhibit 2.

Commission staff in making its recommendation to the Arizona Commission to issue NewPath a CCN.²² The Arizona Commission staff rejected the City's contentions:

Staff disagrees with the Towns' arguments in this regard. ***The backhaul and transport services provided by NewPath are private lines services which the Commission regulates and has jurisdiction over.*** The fact that portions of the service provided by NewPath utilize wireless technology does not impact the Commission's jurisdiction over the private lines services offered by the Applicant. Moreover, 47 U.S.C. § 332 is not applicable to the private line services offered by NewPath. 47 U.S.C. § 332 preempts the Commission's jurisdiction over "commercial mobile radio services" only provided to retail end-user customers.²³

The Arizona Commission ultimately agreed with its Staff by adopting Staff's recommendation and issuing NewPath's certificate. The Arizona Commission also considered the issues raised by Scottsdale and the Towns of Paradise Valley and Carefree in its decision to issue a certificate to a third DAS provider, ExteNet, in October 2009. In its Order issuing ExteNet's certificate, the Commission indicated that it had considered the arguments raised by the City of Scottsdale and Towns of Paradise Valley and Carefree in the NewPath proceeding, but ultimately adopted Staff's recommendation that "the Commission has jurisdiction over ExteNet and its proposed services and the CC&N should be granted." *In re: Application of ExteNet Systems, Inc., Docket No. T-20597A-08-0320*, Decision No. 71294 (Oct. 7, 2009). (Reply SOF ¶ 24). NextG, ExteNet, and NewPath all provide the same basic service(s), and thus, the Arizona Commission has repeatedly considered those services and found, after a full hearing, that the companies and services are within the Arizona Commission's jurisdiction because they are not mobile services. This Commission should do the same.

²² See generally, *In re: Application of NewPath Networks, LLC, for Approval of a Certificate of Convenience and Necessity to Provide Transport and Backhaul Services*, Staff Memorandum on the Issues Raised by the Towns of Paradise Valley and Carefree (Sep. 21, 2009) ("Staff Memorandum"). A copy of the Staff Memorandum is attached hereto as Exhibit 3.

²³ Staff Memorandum at 1-2 (emphasis added).

IV. CONCLUSION

For the foregoing reasons, NextG respectfully requests that the Commission issue a Declaratory Ruling that NextG's Service is not Commercial Mobile Radio Service.

Respectfully submitted,



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December 21, 2011

EXHIBIT 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000832

11/21/2011

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

NEXTG NETWORKS OF CALIFORNIA INC

JON D WEISS

v.

CITY OF SCOTTSDALE

ERIC C ANDERSON

**ORDER SIGNED
TRIAL VACATED**

IT IS ORDERED granting Plaintiff's Unopposed Motion to Stay Pursuant to the Primary Jurisdiction Doctrine, electronically filed on November 14, 2011, all in accordance with the formal written Order signed by the Court on November 18, 2011 and entered (filed) by the Clerk on November 21, 2011.

IT IS FURTHER ORDERED vacating the three (3) day Trial to the Bench scheduled for January 9, 2012.

Please note: The Court has signed a hard-copy version of the order provided with an electronically filed pleading. Therefore, copies of the order and self-addressed, stamped envelopes were not available for mailing to the parties. After the order has been scanned and docketed by the Clerk of Court, copies of this order may be available through ECR Online at clerkofcourt.maricopa.gov or through AZTurboCourt.gov and from the Public Access Terminals at the Clerk of Court's offices located throughout Maricopa County.

NOTE: It is this Division's preference that counsel/parties allow sufficient time for the Order signed by the Court to be scanned and docketed before contacting the Division regarding the same.

**SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY**

CV 2010-000832

11/21/2011

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

EXHIBIT 2

ORIGINAL

INTERVENTION



0000095325

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Attorneys for Defendant City of Scottsdale

BEFORE THE ARIZONA CORPORATION COMMISSION

Commissioners:

Kristen K. Mayes, Chairman
Paul Newman
Gary Pierce
Sandra D. Kennedy
Bob Stump

Docket No. T-20567A-07-0662

**APPLICATION FOR INTERVENTION
BY CITY OF SCOTTSDALE, ARIZONA**

Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION
OF NEWPATH NETWORKS, LLC, FOR
APPROVAL OF A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE TRANSPORT AND
BACKHAUL TELECOMMUNICATIONS
SERVICES

The City of Scottsdale, an Arizona Municipal Corporation ("the City") applies to the Commission for an order pursuant to Ariz. Adm. Code § R14-3-105 allowing the City to intervene as an interested party in the above-entitled proceedings. This application is made because circumstances have become clear that the interests of the City of Scottsdale, and other cities and towns similarly situated in the State of Arizona, may be impacted by the issuance of a Certificate of Convenience and Necessity to NewPath Networks, LLC. The grounds and merits for granting this application for intervention are more thoroughly set forth in the Memorandum of Points and Authorities set forth below.

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1 consisting of multiple antennas in the downtown and northern areas of the City.¹

2 **Impact to the City's Interests:**

3 As a municipality, the City is charged with the management, maintenance and regulation
4 of its rights-of-way. This includes a responsibility to its citizens to assure that the City receives
5 fair and reasonable compensation for the use thereof. Both NewPath and NextG have asserted,
6 to varying degrees, that their possession of a CC&N from this Commission will impact and
7 limit the City's ability to require compensation for the use of its rights-of-way. According to
8 A.R.S. § 9-582, a City is restricted on charges which can be imposed upon a public service
9 corporation who is using the public rights-of-way to provide telecommunication services as
10 defined therein.
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13 On August 18, 2008, NewPath's counsel forwarded to the City a letter challenging the
14 City's existing fee structure which previously has not been legally challenged by the several
15 wireless companies already using the rights-of-way. (Exhibit A, Letter from Channel Law
16 Group to John Little.) This letter references A.R.S. §§ 9-582 and - 583 as a basis for
17 invalidating the City's fee structure. NextG has also sent a letter to the City challenging the fee
18 structure. (Exhibit B, NextG letter.) NextG is even more assertive. NextG claims that its
19 possession of a CC&N from this Commission preempts City regulation and fees for its DAS
20 almost entirely.²
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25 ¹ The City has been informed that the Commission has already issued a CC&N to NextG for transport and backhaul services.

26 ² Under both federal and state law, the City would be required to treat NextG and New Path on a non-discriminatory basis.